WONG YOK MOI

v.

YONG YOU MIN

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: S5-22-500-2000]
11 JULY 2001

CIVIL PROCEDURE: *Jurisdiction - High Court - Whether phrase 'local jurisdiction' would include Selangor and Federal Territory - Courts of Judicature Act 1964, s. 3 - Time limited for appearing - Whether eight or twelve days - Rules of the High Court 1980, O. 12 r. 4(a)*

CIVIL PROCEDURE: *Writ of summons - Address of defendant - Whether service of writ of summons on defendant's residential address defective - Whether contravened O. 12 r. 4(a) Rules of the High Court 1980*

This appeal by the defendant was against the senior assistant registrar's decision to dismiss the defendant's application for an order to set aside a writ of summons and its service thereof by the plaintiff. The defendant contended that the writ of summons was issued by the Kuala Lumpur High Court in the Federal Territory and served on the defendant at the defendant's residence located in Selangor. That gave the defendant only eight days to enter an appearance, and this was submitted to be in contrary to O. 12 r. 4(a) of the Rules of the High Court 1980 ("RHC"). The defendant argued that he was entitled to twelve days, because service was effected outside local jurisdiction.

Held:

[1] Under s. 3 of the Courts of Judicature Act 1964, the phrase 'local jurisdiction' of the High Court in Malaya would include Selangor as well as the Federal Territory. The writ of summons was filed by the plaintiff in the Federal Territory, therefore the time limited for appearing would be eight days and not twelve days as alleged.

[2] Since the writ of summons were "received and filed" by the registry of the High Court at Wisma Denmark, Kuala Lumpur; it meant that the time limited for appearing that was inserted to be eight days was correct.

[3] There is no difference whether the defendant's place of employment and his residence were within Selangor or within Federal Territory, as the time limited for appearing would be the same, *ie* eight days.

[Defendant's appeal dismissed with costs.]

Case(s) referred to:

Bidder v. Bridges [1884] 26 Ch D 1 ***(foll)***
Bonnard v. Perryman [1891] 2 Ch 269 ***(foll)***
Datin Melati Abdullah & Ors v. Syed Hassan Syed Salim [1999] 5 CLJ 582 ***(foll)***
Dynacast (S) Pte Ltd v. Lim Meng Siang & Ors [1989] 2 CLJ 1116; [1989] 2 CLJ (Rep) 900 ***(foll)***
Harkness v. Bell's Asbestos And Engineering Ltd [1967] 2 QB 729 ***(refd)***
Khooi Beng Aun v. Koh Chin Lean [1994] 4 CLJ 138 ***(foll)***
Lee Meow Lim v. Lee Meow Nyin t/a Cheong Fatt Merchant (Nabisco Brands (M) Sdn Bhd, Intervener) [1990] 3 MLJ 123 ***(dist)***
MR Properties Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [1999] 1 AMR 810 ***(dist)***
MUI Bank Bhd v. Alkner Investments Pte Ltd [1990] 3 MLJ 385 ***(dist)***
Myers v. Elman [1940] AC 282 ***(foll)***
Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 ***(foll)***
Punca Klasik Sdn Bhd v. Seok Kim Leow [1996] 4 CLJ 399 ***(foll)***
Re Anthony Birrell, Pearce & Co, Doig v. Anthony Birrell, Pearce & Co [1899] 2 Ch 50 ***(foll)***
Re Palmes, Palmes v. R [1901] WN 146 ***(foll)***
Seloga Jaya Sdn Bhd v. Pembenaan Keng Ting (Sabah) Sdn Bhd [1994] 2 CLJ 716 ***(foll)***
Watts v. Watts [1876] 45 LJ Ch 658 ***(foll)***

Legislation referred to:

Courts of Judicature Act 1964, s. 3
Rules of the High Court 1980, O. 6 r. 1, O. 12 r. 4(a), O. 62 rr. 3, 9, O. 92 r. 3
Rules of the Supreme Court 1957, O. 2 r. 1, O. 20 r. 11, O. 83, O. 128 r. 1(1)

Limitation Act 1939 [UK], s. 2(1)
Limitation Act 1963 [UK], s. 1

For the plaintiff - Charles Hector; M/s Charles Hector & Co
For the defendant - HY Lee; M/s Sia Boon Chee & Co

Reported by Raja Vishnu Sivarajah

JUDGMENT

Abdul Malik Ishak J:

Introduction

This was an appeal in encl. 32 by the defendant to the judge in chambers against the decision of the learned Senior Assistant Registrar ("SAR"), in the person of Madam Wan Azizon Ahmad, dated 25 August 2000 wherein the learned SAR dismissed the defendant's application in encl. 16 with costs. Briefly, encl. 16 was the defendant's application for an order to set aside the writ of summons and the service thereof on the grounds that the time limited for appearance within eight days did not comply with O. 12 r. 4(a) of the Rules of the High Court 1980 ("RHC") and that the defendant was served

with the photostat copies of the writ of summons and the statement of claim. I shall focus my judgment on these two grounds, and I shall now proceed to the heart of the matter.

Time Limited For Appearance Within Eight days Did Not Comply With O. 12 r. 4(a) of the RHC

The defendant says that he works as a bank officer at the Hock Hua Bank Berhad branch office bearing an address at No: 35, Jalan Semenyih, 43000 Kajang, Selangor. The defendant too says that he resides at No: 29, Jalan SL 2/3, Bandar Sungai Long, 43200 Cheras and he says that this was the address where he was served with the writ of summons on 20 July 2000. It is pertinent to note that the first page of the writ of summons, in encl. 1, bears the two addresses of the defendant. A submission was made on behalf of the defendant that the two post codes clearly showed that the defendant's place of employment and his residence were within the State of Selangor. The plaintiff through her counsel strenuously objected to any references to post codes because, so it was said, that these points were not alluded to at all in the affidavits. It was the stand of the plaintiff that this was, pure and simple, an argument based on affidavit evidence and so the parties were bound to restrict and curtail their submissions within the ambit and scope of the affidavit evidence. The case of *Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609 was heavily relied upon by the plaintiff especially the passage at p. 614 of the report where Gopal Sri Ram JCA speaking for the Court of Appeal said of the value of affidavit evidence in these words:

> Now, it is a well settled principle governing the evaluation of affidavit evidence that where one party makes a positive assertion upon a material issue, the failure of his opponent to contradict is usually treated as an admission by him of the fact so asserted: *Alloy Automotive Sdn Bhd v. Perusahaan Ironfield Sdn Bhd* [1986] 1 MLJ 382; *Overseas Investment Pte Ltd v. O'Brien* [1988] 3 MLJ 332.

Consequently, flowing from *Ng Hee Thoong* it was strenuously argued for the plaintiff that the court should ignore the arguments that were based on the post codes. In rebuttal, the defendant cited and relied on the case of *Seloga Jaya Sdn Bhd v. Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 CLJ 716 SC where Edgar Joseph Jr SCJ held that an appeal to the judge in chambers was by way of a re-hearing and the judge was not fettered in any way by the earlier exercise of the registrar's discretion. I was asked to exercise my discretion as though the matter came before me for the very first time. I am bound by the decisions of these two superior courts and I proceeded further to hear the submissions of the parties.

It was pointed out that the defendant had not disputed nor contradicted the assertion that the defendant resided in Cheras, Kuala Lumpur and/or in Cheras. All the affidavits of the defendant were silent on this point. It was submitted that it was not open to the defendant to adopt the stand that the defendant's residence was in the State of Selangor when this was never alluded to in the affidavits of the defendant. The plaintiff was thus deprived of the opportunity to rebut and respond. It was the stand of the plaintiff that since the defendant's residence was in Cheras Kuala Lumpur, and/or in Cheras it constituted, to borrow the words of Gopal Sri Ram JCA in *Ng Hee Thoong*, "a positive assertion upon a material issue".

The defendant was still adamant and reiterated that his place of employment and residence bearing those post codes showed that they were within the State of Selangor. The defendant alluded to encl. 17 – an affidavit affirmed by the defendant himself dated 26 July 2000, and he emphasised and highlighted on paras. 3 and 4 thereto by submitting that the service of the writ of summons on the defendant's residential address was defective in that it contravened O. 12 r. 4(a) of the RHC. Paragraphs 3 and 4 of encl. 17 were worded in this way:

> 3. Saya memohon kebenaran Mahkamah Mulia untuk merujuk kepada penyampaian Writ Saman dalam tindakan ini yang dilaksanakan ke atas saya melalui penyampaian diri pada 20 haribulan Julai, 2000 di No. 29, Jalan SL 2/3, Bandar Sungai Long, 43200 Cheras dan bukannya 19.7.2000 seperti tercatat dalam afidavit saya yang difailkan dalam ini. Sesalinan Surat bertarikh 19.7.2000 daripada Tetuan Charles Hector & Co. dilampirkan di sini dan ditanda sebagai eksibit 'Y-1'.
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> 4. Saya sesungguhnya percaya bahawa Writ tersebut adalah tidak sah, defektif kerana:
>
> i) Tempoh masa untuk kemasukan kehadiran tidak mematuhi Aturan 12 Kaedah 4(a) Kaedah Mahkamah Tinggi 1980;
>
> ii) Saya hanya diberikan salinan Photostat Writ Saman dan Pernyataan Tuntutan dalam tindakan ini dan dikemukakan di sini dan ditanda sebagai ekshibit 'Y-2'.

and according to the plaintiff these assertions were of no consequence. O. 12 r. 4(a) of the RHC states as follows:

> References in these rules to the time limited for appearing are references:
>
> (a) in the case of a writ served within the local jurisdiction of each High Court in Malaya, to 8 days and served outside such local jurisdiction but within the jurisdiction of Malaya, to 12 days after service of the writ (including the day of service) or, where that time has been extended by or by virtue of these rules, to that time as so extended;

and it is crucial to know the meaning to be assigned to the words "local jurisdiction". Section 3 to the Courts of Judicature Act 1964 defines the meaning to the words "local jurisdiction" as follows:

> (a) in the case of the High Court in Malaya, the territory comprised in the States of Malaya, namely, Johore, Kedah, Kelantan, Malacca, Negeri Sembilan, Pahang, Penang, Perak, Perlis, Selangor, Terengganu and the Federal Territory of Kuala Lumpur;

and it was submitted on behalf of the defendant that the writ of summons was issued by the Kuala Lumpur High Court in the Federal Territory of Kuala Lumpur and served on the defendant at the defendant's residence located at Cheras in the State of Selangor. The writ of summons gave the defendant only eight days to enter an appearance and this was said to be contrary to O. 12 r. 4(a) of the RHC. By right, so the submission went, the defendant was entitled to twelve days after the service of the writ of summons to enter an appearance because service on the defendant was effected outside the local jurisdiction.

Now, the plaintiff affirmed an affidavit on 7 August 2000 as seen in encl. 21 and there the plaintiff deposed that the defendant was served with the writ of summons at the defendant's residential address at Cheras, Kuala Lumpur and hence that service was within the local jurisdiction of the court. It was pointed out by the defendant's counsel that the affidavit in encl. 21 did not state the source of the deponent's information and belief to show that the defendant's residential address was in the Federal Territory of Kuala Lumpur. It was also pointed out by the defendant's counsel that the averment in encl. 21 to the effect that the process server had served the writ of summons at the defendant's residential address in Kuala Lumpur on 20 July 2000 was not only a bare allegation but also contrary to the contents of the affidavit of service in encl. 23 and also contrary to the letter sent by M/s Charles Hector & Co, advocates and solicitors (who represented the plaintiff) to the defendant as seen in exh. "Y1" of encl. 21. At this juncture, two authorities must be put to the forefront. One would be the case of *Datin Melati Abdullah & Ors v. Syed Hassan Syed Salim* [1999] 5 CLJ 582 where at p. 584 to p. 585, I had this to say:

> In affirming the affidavit in encl. 10, Mr. Joseph Mathews deposed, *inter alia*:
>
> 1. I am an advocate and solicitor of the High Court of Malaya practising under and in the name and style of Messrs Radzuan Ibrahim & Co, solicitor for the abovenamed defendant.
>
> 2. I am the counsel having conduct of this case and I am authorised to affirm this affidavit.

and in so doing he did not state the source of the information or belief. In *Re JL Young Manufacturing Company Ltd* [1900] 2 Ch 753 it was held that an affidavit of information and belief, which did not state the source of the information and belief, was irregular and therefore inadmissible as evidence. I am aware that that case was governed by the then O. 38 r. 3 of the Rules of the Supreme Court 1883, which provided that 'affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions, on which statements as to his belief, with the grounds thereof, may be admitted ….', but nevertheless the principle of law distilled from that case may be used as a guideline. In Savings and Investment Bank Ltd [1984] 1 WLR 271, the court vigorously applied *Re JL Young Manufacturing Company Ltd [supra]* and held that statements of information or belief have no probative value unless the sources and grounds of the information and belief are revealed. In encl. 10, Mr. Joseph Mathews did not even depose that he affirmed the affidavit based on information and belief and that being the case he naturally did not reveal the sources and grounds of the information and belief. I cannot help but feel constrained to say that Mr. Joseph Mathews must have taken unto himself to affirm encl. 10 without thinking of the dire consequences that may flow from it including the inadmissibility of what he had deposed.

Order 41 r. 5(2) of the RHC states as follows:

> An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof.

and the meaning to be attached to the words 'interlocutory proceedings' must surely be circumscribed by the word 'interlocutory' which in essence refer to those applications which do not decide the rights of the parties (*Gilbert v. Endean* [1878] 9 Ch D 259; *Rossage v. Rossage* [1960] 1 WLR 249 CA; and *Re J (An Infant)* [1960] 1 WLR 253, [1960] 1 All ER 603). The Court of Appeal in *Re JL Young Manufacturing Co [supra]* took exception and commented in strong terms on the irregularity of an affidavit founded upon information and belief without giving the source of such information and belief. In the same vein, reference to the case of *Lumley v. Osborne* [1901] 1 KB 532 must also be made. In my judgment, in affirming encl. 10 Mr. Joseph Mathews has run counter to O. 41 r. 5(2) of the RHC – an irregularity that was incurable.

The other case would be that of *Dynacast (S) Pte Ltd v. Lim Meng Siang & Ors* [1989] 2 CLJ 1116 where at p. 1121 to p. 1122 of the report, Chao Hick Tin JC observed that:

> Order 41 rule 4 provides that 'an affidavit may with leave of the court, be filed or used in evidence notwithstanding any irregularity in the form thereof'. Now the question is: is an omission to state the source a matter of form? I do not think so.

Further down the same page, Chao Hick Tin JC continued:

> As regards O. 2 r. 1, it provides that a failure to comply with the requirements of the RSC rules, whether in respect of, *inter alia*, form or content, shall be treated as an irregularity. The court has the power either to set aside wholly or in part the proceedings or to allow amendments to be made. I do not think that a failure of such a kind like the present, which in effect means that there was no evidence before the court warranting the grant of an interim order, is one which this court should overlook and grant indulgence. Order 41 r. 5(2) is an exception to the general rule that a person can only depose to what he knows. If a deponent does not comply with O. 41 r. 5(2), then his evidence is no evidence at all and cannot be relied upon. It is a defect of a fundamental nature.

By way of a rebuttal, the plaintiff's counsel in the person of Charles Hector heavily relied on the case of *Harkness v. Bell's Asbestos And Engineering Ltd* [1967] 2 QB 729. The facts of that case may be sated as follows. The plaintiff left his employment with the defendants and he soon found himself to be suffering from asbestosis – a disease which he claimed was caused by the defendant's failure to supply him with protective clothing while he was in contact with asbestos. But the plaintiff's claim would have been barred by the Limitation Acts of 1939 and 1954, and so his solicitors before issuing the writ, applied *ex parte* to the district registrar under s. 1 of the Limitation Act 1963 for leave of the court for the purposes of the said Act. On 16 April 1964, the deputy registrar ordered that s. 2(1) of the Act of 1939 should not afford a defence to the plaintiff's proposed action for damages. A writ was issued on 17 April 1964. By R.S.C. O. 128 r. 1(1), the jurisdiction to grant leave for the purposes of s. 1 of the Limitation Act 1963 was vested in a judge in chambers. The defendants applied to set aside the district registrar's order on the grounds that he had no jurisdiction to make it and that any order should have been for leave to proceed for the purposes of s. 1 of the Limitation Act 1963. On 10 May 1966, Blain J, held that the registrar's order was a nullity, and made no order on the application. On 11 July 1966, James J, dismissed the plaintiff's application under R.S.C., O. 2 r. 1, to rectify the registrar's order and have it treated as valid. The plaintiff appealed, and contended that the case came within R.S.C., O. 2 r. 1, and that the form of the registrar's order was an "accidental slip or omission" within R.S.C., O. 20 r. 11. For the defendants it was contended that at the time of the registrar's order there were no "proceedings" because no writ had been issued, and further that the Limitation Act 1963 required that application should be made to "the court", which did not include a district registrar. In allowing the appeal the Court of Appeal held that the application to the district registrar constituted "proceedings" in the High Court within the meaning and ambit of R.S.C., O. 2 r. 1, under which the court had power to correct the errors made

as irregularities and that accordingly the plaintiff would be granted leave for the purposes of s. 1 of the Limitation Act 1963. Lord Denning MR writing a separate judgment had this to say at p. 735 to p. 736 of the report:

> In my opinion, therefore, Blain J was in error, and so was James J. This new rule does away with the old distinction between nullities and irregularities. Every omission or mistake in practice or procedure is henceforward to be regarded as an irregularity which the court can and should rectify so long as it can do so without injustice. It can at last be asserted that 'it is not possible for an honest litigant in Her Majesty's Supreme Court to be defeated by any mere technicality, any slip, any mistaken step in his litigation.' See *Pontin v. Wood* [1962] 1 Q.B. 594: per Holroyd Pearce L.J. at p. 609. That could not be said in 1963: see *In re Pritchard, decd.* [1963] Ch. 502. But it can be in 1966. The new rule does it.
>
> This is plainly a case where we should put the matter right under the new provisions and the leave should be treated as granted properly.
>
> I would allow the appeal accordingly.

Diplock LJ, in writing a separate judgment, had this to say (see p. 736 to p. 737 of the report):

> The view, though logical, is contrary to authority and it has been long laid down that where an order is a nullity, the person whom the order purports to affect has the option either of ignoring it or of going to the court and asking for it to be set aside. If he adopts the second course, he is entitled *ex debito justitiae* to have it set aside if it is shown to be a nullity. In the result Blain J., though asked to take that course by both parties, did not do so. The plaintiff therefore found himself in the position of a successful respondent to an appeal and deprived of his opportunity to appeal from that. Even if there had been an order made at an interlocutory stage by Blain J., I am by no means sure that that would have prevented the plaintiff from arguing that the order was wrong in a subsequent interlocutory proceeding. However that may be, in this case there was no order made by Blain J. and I am quite satisfied that in those circumstances James J. was not deprived of jurisdiction to make an order correcting the error exercising the powers under R.S.C., Ord. 2, r. 1.

It was further argued on behalf of the plaintiff that the cases of *Datin Melati Abdullah & Ors v. Syed Hassan Syed Salim (supra*) and *Dynacast (S) Pte Ltd v. Lim Meng Siang & Ors (supra)* were distinguishable. It was said that in *Datin Melati Abdullah*, Joseph Mathews "did not state the source of the information or belief" (see p. 584 of the CLJ reporting) whereas the present plaintiff in her fourth affidavit in encl. 21 at para. 1 disclosed the source of her information or belief in the following fashion:

> Saya adalah plaintif yang dinamakan dalam tindakan ini dan segala pernyataan yang dibuat di dalam affidavit ini adalah sesungguhnya benar dan adalah

berdasarkan kepada pengetahuan saya sendiri dan/atau kepada dokumen-dokumen yang saya mempunyai akses. Saya mempunyai kuasa untuk membuat dan mengikrarkan affidavit ini kerana saya adalah plaintif dalam tindakan ini.

It was pointed out that in *Dynacast (S) Pte Ltd v. Lim Meng Siang & Ors (supra)*, the court was concerned with an *ex parte* application for an Anton Piller order where the issue of full and frank disclosure had to be addressed. Here, in the present case, the appeal in encl. 32 by the defendant was in relation to encl. 16 where the learned SAR dismissed the defendant's application in encl. 16 to set aside the writ of summons and the service thereof.

The defendant relied on three authorities to drive home the message that there was a need to state the source of the information or belief in an affidavit and these three authorities were *MUI Bank Bhd v. Alkner Investments Pte Ltd* [1990] 3 MLJ 385; *Lee Meow Lim v. Lee Meow Nyin t/a Cheong Fatt Merchant (Nabisco Brands (M) Sdn Bhd, Intervener*) [1990] 3 MLJ 123; and *MR Properties Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [1999] 1 AMR 810. But, factually speaking, these three authorities were different from the present appeal. The case of *MUI Bank Bhd (supra)* was in relation to a mortgagee proceeding under O. 83 of the Rules of the Supreme Court 1980, while the case of *Lee Meow Lim (supra)* was an appeal against the decision of the sessions judge who allowed a third party to intervene and who ordered the writ of distress to be struck out. The case of *MR Properties Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri (supra)* was in relation to an appeal against the decision of the special commissioners for income tax.

It was ingeniously argued that the plaintiff in the present appeal realising that she had not complied with O. 12 r. 4(a) of the RHC had applied by way of encl. 25 to amend the writ of summons. But the application in encl. 25 was stayed by the learned SAR pending disposal of the present appeal by me. Now, basically encl. 25 was essentially the plaintiff's application to add a second defendant and at the same time to amend the writ of summons and the statement of claim. The proposed second defendant which the plaintiff had in mind to add was Hock Hua Bank Bhd.

I pause here for a while. I need to take stock of the situation. The parties through their learned counsel made valiant attempts to persuade me to decide encl. 32 in their favour. Would it make any difference if the defendant's place of employment and his residence were within the State of Selangor and not in the Federal Territory of Kuala Lumpur? O. 12 r. 4(a) of the RHC states that the time limited for appearing in the case of a writ served within the local jurisdiction of each High Court in Malaya to be eight days; and if service is made outside the local jurisdiction but within the jurisdiction of Malaya it would be twelve days after the service of the writ or where time has been extended. Under s. 3 of the Courts of Judicature Act 1964, the phrase "local

jurisdiction" of the High Court in Malaya would include Selangor as well as the Federal Territory of Kuala Lumpur. It must be emphasised that the writ of summons and the statement of claim were filed in the Federal Territory of Kuala Lumpur – to be precise in the High Court of Malaya located at Wisma Denmark, and therefore the time limited for appearing would be eight days and not twelve days as alleged. The High Court registry at Wisma Denmark accepted the filing of the writ of summons and the statement of claim there. The relevant "officer charged with the duty of receiving and filing any document" at the registry of the High Court at Wisma Denmark did not find any defect in the writ of summons and the statement of claim and these documents were accepted and filed and they were not rejected nor returned to the plaintiff. Order 92 r. 3 of the RHC states that:

> The Registrar, or any officer charged with the duty of receiving and filing any document, may reject it if it does not substantially comply with these rules.

Surely the learned SAR "or any officer charged with the duty of receiving and filing any document" would be able to act accordingly upon sight of the writ of summons and the statement of claim and decide whether to accept or reject the same after all the defendant's place of employment and his residence were clearly typed at the front page. That the writ of summons and the statement of claim were "received and filed" by the registry of the High Court at Wisma Denmark meant that, firstly, the papers were in order and, secondly, that the time limited for appearing that was inserted to be eight days was correct and, thirdly, that it was filed in the appropriate registry (*Watts v. Watts* [1876] 45 LJ Ch 658, CA). Indeed the plaintiff had complied with O. 6 r. 1 of the RHC when she filed the writ of summons and the statement of claim. O. 6 r. 1 of the RHC states that:

> Every writ must be in Form 2 or 3, whichever is appropriate.

The appropriate Form for the plaintiff to rely upon would be Form 2 and that Form is worded in this way (see form 2 as set out in the RHC – the relevant portions only):

WRIT OF SUMMONS

IN THE HIGH COURT OF MALAYA/BORNEO AT ...
Suit No. ... of 19 ...

(Seal)

Between

... Plaintiff

and

... Defendant

THE HONOURABLE MR JUSTICE ... CHIEF JUSTICE OF MALAYA/ BORNEO, IN THE NAME OF THE YANG DI PERTUAN AGONG

To ...

We command you that within eight days after the service of this writ on you, inclusive of the day of such service, you do cause an appearance to be entered for you in a cause at the suit of ... and take notice, that in default of your so doing the plaintiff may proceed therein to judgment and execution.

WITNESS ... Registrar of the Court in ... the ... day of ... , 19...

... ...
Plaintiff's solicitors Registrar, High Court

Memorandum to be Subscribed on the Writ

This writ may not be served more than twelve calendar months after the above date unless renewed by order of court.

The defendant (or defendants) may appear hereto by entering an appearance (or appearances) either personally or by a solicitor at the Registry of the High Court.

A defendant appearing personally may, if he desires, enter his appearance by post, and the appropriate forms may be obtained by sending a Postal Order for $ ... with an addressed envelope to the Registrar, High Court at ... .

Indorsements to be made on writ before issue

In my judgment, there was compliance with Form 2 at the point of time when the plaintiff filed her writ of summons and the statement of claim. The time limited for "appearing" for the State of Selangor and the Federal Territory of Kuala Lumpur would be the same – namely, eight days. Thus, it makes not a whit of a difference whether the defendant's place of employment and his residence were within the State of Selangor or within the Federal Territory of Kuala Lumpur since the time limited for "appearing" would be the same – namely, eight days.

It was part and parcel of my judgment that the plaintiff in her affidavit in encl. 21 at para. 1 had disclosed the source of her information or belief and, consequently, she had complied with the requirements of the law as set out in the string of cases as alluded to earlier. Of course, those cases as alluded to earlier were factually different but the law as set out therein are germane and of significance. The law requires that the source of the information or belief must be stated and alluded to (*Datin Melati Abdullah & Ors v. Syed Hassan Syed Salim (supra)*) and the opposite party is certainly entitled to insist that it should be given (*Bidder v. Bridges* [1884] 26 Ch D 1, CA; *Bonnard v. Perryman* [1891] 2 Ch 269, CA; *Re Palmes, Palmes v. R* [1901] WN 146;

and *Re Anthony Birrell, Pearce & Co, Doig v. Anthony Birrell, Pearce & Co* [1899] 2 Ch 50). It is quite onerous on the part of a solicitor when that solicitor files an affidavit. According to the case of *Myers v. Elman* [1940] AC 282, [1939] 4 All ER 484 HL once a solicitor discovers that an affidavit which he has played a part in putting it in the file is in fact false, then that solicitor must remedy the situation expeditiously so long as he continues to act as a solicitor for his client. It is a correct statement of the law to say that affidavits sworn for the purpose of it being used in interlocutory proceedings may contain statements of information or belief stating the sources and grounds thereof. And interlocutory proceedings are usually in relation to those proceedings which do not decide the rights of the parties but are rather made for the purpose of keeping matters in *status quo* until the rights of the parties have been decided by a court of competent jurisdiction (*Datin Melati Abdullah & Ors v. Syed Hassan Syed Salim (supra)*).

That The Defendant Was Served With The Photostat Copies Of The Writ Of Summons And The Statement of Claim As Alluded To In Encl. 16

The process server by the name of Chee Hong Tek affirmed an affidavit of service in encl. 23 on 26 July 2000 and there he deposed that he served merely copies of the writ of summons and the statement of claim on the defendant by way of personal service on 20 July 2000. There was no mention of service of photostat copies of those documents. At para. 2 of encl. 23, Chee Hong Tek deposed as follows:

> 2. Bahawa saya pada hari Khamis, bersamaan 20.7.2000, pada lebih kurang jam 4.10 petang, di 29, Jalan SL 2/3, Bandar Sungai Long, 43200 Cheras, yang merupakan alamat rumah Defendan, telah menyampaikan sesalinan Writ Saman dan Pernyataan Tuntutan dalam tindakan ini kepada Defendan yang dinamakan di atas, di mana orang yang menerima Saman tersebut telah mengakui kepada saya bahawa dia adalah Yong You Min, iaitu Defendan dalam tindakan ini. Pada masa yang sama juga, saya telah menyampaikan sesalinan Saman Dalam Kamar (Ex-parte) bertarikh 19.7.2000, Afidavit yang diikrarkan oleh Plaintif pada 19.7.2000, Deraf Perintah bertarikh 19.7.2000, Sijil Perakuan Segera serta surat muka peguamcara Plaintif yang juga memberitahu tentang tarikh pendengaran Inter-Parte bagi Saman Dalam Kamar tersebut yang telah ditetapkan oleh Mahkamah adalah pada 28.7.2000 pada jam 9.00 pagi. Defendan telah mengesahkan penyampaian tersebut pada surat muka peguamcara tersebut.
>
> Sesalinan Writ Saman dan Pernyataan Tuntutan tersebut, surat muka peguamcara, sesalinan Saman Dalam Kamar, muka depan Afidavit Plaintif (di mana kerana tebal, hanya muka depan dilampirkan), sesalinan Sijil Perakuan Segera dan Salinan Deraf Perintah yang diluluskan yang telah ditunjukkan kepada saya kini dilampirkan dan ditanda sebagai Ekshibit 'CHT-1'.

and flowing from it the defendant somehow argued through HY Lee that the service of the photostat copies of the writ of summons and the statement of claim was against and contrary to O. 62 r. 3 of the RHC. But that order merely referred to "sealed copy" and "an office copy" and not to "photostat copy". Be that as it may, that order states as follows:

> 3. Personal service of a document is effected by leaving a copy of the document with the person to be served and, if so requested by him at the time when it is left, showing him –
>
> (a) in the case where the document is a writ or other originating process, the sealed copy; and
>
> (b) in any other case, an office copy.

H.Y. Lee then pointed that the affidavit of service in encl. 23 did not state that O. 62 r. 3 of the RHC had been complied with. But, with respect, there was no necessity to do so as there was nothing in O. 62 r. 3 of the RHC that sets out that requirement. It was also argued that encl. 23 did not comply with O. 62 r. 9 of the RHC and that Order reads as follows:

> 9. An affidavit of service of any document must state by whom the document was served, the day of the week and date on which it was served, where it was served and how and must be in one of the forms in Form 137.

For this exercise, the relevant form would be Form 137(a) and that form can be seen in the RHC and it is worded in this manner:

> (Title as in action)
>
> (a) Affidavit of Personal Service of writ of summons or other process on a person
>
> I ... of .. do make oath (or affirm) and say as follows:
>
> 1. I did on ... the ... day of ... 19 ..., at (state where) personally serve (the abovenamed defendant) (or one of the abovenamed defendants) (or a partner in the abovenamed defendant firm of ... & Co) (or the person (the insertion of the name is not essential) having at the time of such service the control or management of the said partnership business) (or as may be) with a true copy of the writ of summons (or as may be) in this action which appeared to me to have been regularly issued out of the Registry of the High Court against (the abovenamed defendant) (or the abovenamed defendants) (or as may be) at the suit of (the abovenamed plaintiff) (or plaintiffs) (or as may be) and which was dated the ... day of ..., 19....

2. The defendant (or as may be) (is known to me) (or was pointed out to me by ...) (or admitted to me that he was ...).

3. At the time of the said service the said writ (or as may be) and the copy thereof were subscribed (and indorsed) in the manner and form prescribed by the Rules of the High Court, 1980.

4. I did on the ... day of ... indorse on the said writ the day of the month and the week of the said service on the said defendant.

Sworn (or affirmed) as in Form 78.

The arguments of HY Lee must be viewed in the context of encl. 23. Basically, encl. 23 contained the following recitals:

(a) It was affirmed by the deponent by the name of Chee Hong Tek who described himself as a businessman and had acted as a process server to Messrs Charles Hector & Co.

(b) Chee Hong Tek deposed that he did on Thursday, on 20 July 2000 at about 4.10 p.m., at 29, Jalan SL 2/3, Bandar Sungai Long, 43200 Cheras, which represented the house address of the defendant, served a copy of the writ of summons and the statement of claim in this action to the abovenamed defendant who admitted to the deponent that he was the abovenamed defendant in this action. Chee Hong Tek further deposed that at the same time he had served a copy each of the *ex parte* summons in chambers dated 19 July 2000, the affidavit affirmed by the plaintiff on 19 July 2000, the draft order dated 19 July 2000, the certificate of urgency and the letter from the plaintiff's solicitors which relayed the message that the date for the hearing of the *inter parte* for the summons-in-chambers had been fixed by the court on 28 July 2000 at 9 am. The deponent further deposed that the defendant had personally acknowledged receipt on the said letter. The deponent then proceeded to exhibit all the documents alluded to above as an exhibit marked as "CHT1".

(c) Chee Hong Tek deposed that on 20 July 2000 that he had indorsed on the said writ and the statement of claim the day of the month and the week of the said service on the said defendant.

(d) By way of an addition, Chee Hong Tek also stated that the service of the writ of summons and the statement of claim together with the other documents as stated in para. 2 above was witnessed by his friend by the name of Chew Peng Soon (No: K/P: 770430-10-5197).

(e) The deponent – Chee Hong Tek, then affirmed in accordance with the format as set out in Form 78.

and these recitals standing by themselves would relegate the submissions of HY Lee into oblivion. By way of reiteration, para. 2 of encl. 23 merely showed that copies and not the photostat copies of the writ of summons and the statement of claim were served on the defendant. With respect, HY Lee wrongly emphasised on service of photostat copies of those documents. What he should question was whether the sealed copies of those documents have been served on the defendant. That should have been the crucial question to pose but was not posed. Even the defendant's application in encl. 16 was in error. It presumed that photostat copies of those documents were served on the defendant. A presumption that ran counter to encl. 23.

Charles Hector for the plaintiff took extra pains and he strenuously argued that the affidavit of service in encl. 23 complied substantially with O. 62 r. 9 of the RHC and Form 137(a) thereto. He too was unduly concerned about service of photostat copies of those documents. Indeed if it was true that photostat copies of those documents were served then surely that kind of service was insufficient. In *Khooi Beng Aun v. Koh Chin Lean* [1994] 4 CLJ 138, I had occasion to say at p. 139 to p. 140 of the report in regard to the service of photostat copies in these words:

> Reverting back to the issue at hand, when the defendant received the photostat copies of the writ and the statement of claim, the plaintiff had clearly gone against O. 62 r. 3 of the RHC. Such non-compliance with that order cannot be treated as a mere irregularity which can be waived but rather as a matter which prevents any further proceedings from being taken. I venture to say further that the whole matter was bad *ab initio*. It seems to me that where the law provides a particular method or form of procedure for effecting the sealed copies of the writ and the statement of claim, then there must be strict compliance with those provisions, and the Court will not protect the plaintiff where the requirements have not been complied with. As was said by Lord Guest in *Ratnam v. Cumarasamy* [1965] 1 WLR SPC that the rules are meant to provide 'a time-table for the conduct of litigation' and if I may add that that time-table must be strictly adhered to in order to avoid confusion (*Syarikat Telekom Malaysia Bhd. v. Business Chinese Directory Sdn. Bhd.* (Judgment Today No. 19/94)). This means that when the defendant initially received the photostat copies of the writ and the statement of claim he should not be unduly alarmed. He should ignore it and if need be pretend to be ignorant. Even if the plaintiff, at that juncture, were to obtain judgment in default of appearance, the defendant could successfully set it aside as the purported service of the photostat copies of the writ and the statement of claim was bad and, consequently, all the proceedings thereafter were bad and whatever judgment obtained thereafter was accordingly a nullity. In short, at that juncture, the defendant had not been served with the sealed copies of the writ and the statement of claim and the purported service was bad and all proceedings thereafter were bad *ab initio*. In such a situation, there was no need for the

> defendant to apply for leave to enter a conditional appearance and, I agree entirely with Mr. Chong Kok Wei that neither was there a need for leave to be obtained by the plaintiff to re-activate the matter when the plaintiff wanted to re-serve the sealed copies of the writ and the statement of claim on the defendant as there is no such requirement in the RHC. For these reasons, the application in enclosure 11A was dismissed with no order as to costs.

But Charles Hector took a tough stand. He argued that the case of *Khooi Beng Aun v. Koh Chin Lean (supra)* was distinguishable. Factually speaking in *Khooi Beng Aun v. Koh Chin Lean (supra)* the photostat copies of the writ and the statement of claim were received by the defendant by post on 18 April 1994, and the sealed copies of the writ and the statement of claim were received by the defendant on 29 April 1994 by A.R. registered post. Here, in the present appeal, mere copies of the writ of summons and the statement of claim were served by way of personal service by Chee Hong Tek to the defendant who had acknowledged receipt of those documents. Charles Hector then argued that O. 62 r. 3 of the RHC was the applicable provision to apply. He further pointed out that the case of *Khooi Beng Aun v. Koh Chin Lean (supra)* was decided in the context of the defendant's application to apply for leave to enter a conditional appearance. He also argued, notwithstanding the averments in encl. 23, that if it was true that the plaintiff had served the photostat copies of the writ of summons and the statement of claim wrongly then the plaintiff could re-serve it correctly by serving the sealed copies of the writ of summons and the statement of claim to the defendant and for this exercise there was no necessity to obtain leave. It was, pure and simple, a matter of re-activation (see p. 140 of the CLJ reporting of the case of *Khooi Beng Aun v. Koh Chin Lean (supra)*). Charles Hector knew that he was going on an uphill task. He certainly had to reckon with the case of *Khooi Beng Aun v. Koh Chin Lean (supra)*). He knew that he had to obey the RHC to the very letter. In *Punca Klasik Sdn Bhd v. Seok Kim Leow* [1996] 4 CLJ 399, I had occasion to say that (see p. 408 to p. 409 of the report):

> The first principle is the time honoured principle that the rules of Court and the associated rules of practice devised by the Rules Committee and developed by the courts over the years to promote the expeditious despatch of litigation must be rigidly observed. The prescribed time limits are not targets to be aimed at or expressions of pious hope but rather requirements set which should be met rigidly by the parties thereto.

Acting prudently, Charles Hector finally took the trouble of serving the sealed copies of the writ of summons and the statement of claim on the defendant's counsel by the name of Sia Boon Chee from Messrs Sia Boon Chee & Co, advocates and solicitors, Selangor. This was done on 28 July 2000 at about

9.30 am and it took place at the High Court, civil 5 at Wisma Denmark. For this purpose, Charles Hector affirmed an affidavit on 7 August 2000 which was filed the next day and given an encl. number 20. There was thus compliance with the law and the service of the sealed copies of the writ and the statement of claim must be held to be good and proper. It was a perfect service and that was undeniable.

For the reasons adumbrated above, the defendant's appeal in encl. 32 must be dismissed with costs.